

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

MATTHEW WILLIAMS.

Case No. 3:19-cv-00575-MMD-CLB

v

Petitioner.

ORDER

ISIDRO BACA, *et al.*,

Respondents.

11 This is Petitioner Matthew Williams' *pro se* petition for a writ of habeas corpus
12 pursuant to 28 U.S.C. § 2254. Before the Court are Petitioner's motion for appointment
13 of counsel (ECF No. 28) and Respondents' motion to dismiss certain grounds in the
14 petition as unexhausted ("Motion") (ECF No. 68).¹ The Court denies Williams' motion for
15 appointment of counsel and grants Respondents' Motion.

I. Motion for Appointment of Counsel

17 The Court turns first to Williams' third motion for appointment of counsel. (ECF No.
18 28.) As the Court has previously explained, there is no constitutional right to appointed
19 counsel for a federal habeas corpus proceeding. *Pennsylvania v. Finley*, 481 U.S. 551,
20 555 (1987); *Bonin v. Vasquez*, 999 F.2d 425, 428 (9th Cir.1993). The decision to appoint
21 counsel is generally discretionary. *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir.1986),
22 cert. denied, 481 U.S. 1023 (1987); *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), cert.
23 denied, 469 U.S. 838 (1984). However, counsel must be appointed if the complexities of
24 the case are such that denial of counsel would amount to a denial of due process, and
25 where the petitioner is a person of such limited education as to be incapable of fairly
26 presenting his claims. See *Chaney*, 801 F.2d at 1196; see also *Hawkins v. Bennett*, 423
27 F.2d 948 (8th Cir.1970). Previously, the Court determined that Williams' petition—

¹Williams opposed the Motion (ECF No. 33), and Respondents replied (ECF No. 34).

1 together with the supplement to the petition—presents the issues that he wishes to raise
2 in a reasonably clear manner, and the legal issues do not appear to be particularly
3 complex. His third motion for counsel is on the Court's form, with no further elaboration.
4 He presents no new or compelling reason why counsel is justified. Williams' motion is,
5 therefore, denied.

6 **II. Procedural History & Background**

7 In May 2016, a jury convicted Williams of eluding a police officer. (Exh. 48.)² The
8 state district court adjudicated him a habitual criminal and sentenced him to a term of 5
9 to 20 years. (Exh. 60.) Judgment of conviction was entered on August 10, 2016. (Exh.
10 59.)

11 Williams appealed, and the Nevada Court of Appeals affirmed his conviction and
12 sentence on November 14, 2017. (Exh. 96.) The Nevada Court of Appeals affirmed the
13 denial of Williams' state postconviction habeas corpus petition on September 10, 2019.
14 (Exh. 149.)

15 Williams dispatched this federal petition for writ of habeas corpus in September
16 2019. (ECF No. 10.) He filed what the Court deemed as a supplement February 2020.
17 (ECF No. 12 at 2-10.)

18 Respondents now move to dismiss the petition as a mixed petition because they
19 argue that three grounds are unexhausted. (ECF No. 21.)

20 **III. Legal Standard: Exhaustion**

21 State prisoners seeking federal habeas relief must comply with the exhaustion rule
22 codified in § 2254(b)(1):

23 An application for a writ of habeas corpus on behalf of a person in custody
24 pursuant to the judgment of a State court shall not be granted unless it
25 appears that –

26 (A) The applicant has exhausted the remedies available in the court so the
27 State; or

28 ²Exhibits referenced in this Order are exhibits to Respondents' Motion

1 (B) (i) there is an absence of available State corrective process; or
2 (ii) circumstances exist that render such process ineffective to protect the
rights of the applicant.

3 The purpose of the exhaustion rule is to give the state courts a full and fair opportunity to
4 resolve federal constitutional claims before those claims are presented to the federal
5 court, and to “protect the state courts’ role in the enforcement of federal law.” *Rose v.*
6 *Lundy*, 455 U.S. 509, 518 (1982); *O’Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); see
7 also *Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the
8 petitioner has given the highest available state court the opportunity to consider the claim
9 through direct appeal or state collateral review proceedings. See *Casey v. Moore*, 386
10 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir. 1981).

11 A habeas petitioner must “present the state courts with the same claim he urges
12 upon the federal court.” *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal
13 constitutional implications of a claim, not just issues of state law, must have been raised
14 in the state court to achieve exhaustion. *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481 (D.
15 Nev. 1988) (citing *Picard*, 404 U.S. at 276)). To achieve exhaustion, the state court must
16 be “alerted to the fact that the prisoner [is] asserting claims under the United States
17 Constitution” and given the opportunity to correct alleged violations of the prisoner’s
18 federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); see *Hiivala v. Wood*, 195 F.3d
19 1098, 1106 (9th Cir. 1999). It is well settled that 28 U.S.C. § 2254(b) “provides a simple
20 and clear instruction to potential litigants: before you bring any claims to federal court, be
21 sure that you first have taken each one to state court.” *Jiminez v. Rice*, 276 F.3d 478, 481
22 (9th Cir. 2001) (quoting *Rose v. Lundy*, 455 U.S. 509, 520 (1982)). “[G]eneral appeals to
23 broad constitutional principles, such as due process, equal protection, and the right to a
24 fair trial, are insufficient to establish exhaustion.” *Hiivala v. Wood*, 195 F.3d 1098, 1106
25 (9th Cir. 1999) (citations omitted). However, citation to state caselaw that applies federal
26 constitutional principles will suffice. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir.
27 2003) (en banc).

1 A claim is not exhausted unless the petitioner has presented to the state court the
2 same operative facts and legal theory upon which his federal habeas claim is based.
3 *Bland v. California Dept. Of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The
4 exhaustion requirement is not met when the petitioner presents to the federal court facts
5 or evidence which place the claim in a significantly different posture than it was in the
6 state courts, or where different facts are presented at the federal level to support the same
7 theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge v.*
8 *Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455, 458
9 (D. Nev. 1984).

10 **IV. Instant Petition**

11 Respondents argue that grounds 4, 5 and 7 are unexhausted. (ECF No. 21.)

12 **a. Grounds 4 and 5**

13 In ground 4, Williams contends that the prosecutor engaged in misconduct when
14 she failed to call Williams to testify before the grand jury despite being notified by court
15 personnel that Williams was present in the downstairs lobby in violation of his
16 constitutional rights. (ECF No. 12, at 2-3.) In ground 5, Williams asserts a claim of
17 prosecutorial misconduct for failure to produce the testimony of a deputy district attorney
18 who allegedly represented that he would not prosecute the case as a felony. (*Id.* at 3-6.)

19 Williams did not present federal grounds 4 or 5 on direct appeal. Exhs. 89, 93, 96.
20 Thus, these two grounds are unexhausted.

21 **b. Ground 7**

22 Williams argues that his appellate counsel was ineffective for failing to raise on
23 appeal the claim that a deputy district attorney represented that he would not prosecute
24 the case as a felony. (ECF No. 12 at 9-10.) Respondents are correct that Williams did not
25 present this claim to the highest state court. Exhs. 147, 149. Accordingly, ground 7 is
26 unexhausted.

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1 **V. Petitioner's Options Regarding Unexhausted Claims**

2 A federal court may not entertain a habeas petition unless the petitioner has
 3 exhausted available and adequate state court remedies with respect to all claims in the
 4 petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A “mixed” petition containing both
 5 exhausted and unexhausted claims is subject to dismissal. *Id.* In the instant case, the
 6 Court concludes that grounds 4, 5, and 7 are unexhausted. Because the Court finds that
 7 the petition contains unexhausted claims, Williams has these options:

- 8 1. He may submit a sworn declaration voluntarily abandoning the
 9 unexhausted claims in his federal habeas petition, and proceed
 only on the exhausted claims;
- 10 2. He may return to state court to exhaust his unexhausted claims,
 11 in which case his federal habeas petition will be denied without
 prejudice; or
- 12 3. He may file a motion asking this Court to stay and abey his
 13 exhausted federal habeas claims while he returns to state court
 14 to exhaust his unexhausted claims.

15 With respect to the third option, a district court has discretion to stay a petition that
 16 it may validly consider on the merits. *Rhines v. Weber*, 544 U.S. 269, 276, (2005). The
 17 *Rhines* Court stated:

18 [STAY AND ABEYANCE] SHOULD BE AVAILABLE ONLY IN LIMITED CIRCUMSTANCES.
 19 BECAUSE GRANTING A STAY EFFECTIVELY EXCUSES A PETITIONER'S FAILURE TO
 20 PRESENT HIS CLAIMS FIRST TO THE STATE COURTS, STAY AND ABEYANCE IS ONLY
 21 APPROPRIATE WHEN THE DISTRICT COURT DETERMINES THERE WAS GOOD CAUSE FOR
 22 THE PETITIONER'S FAILURE TO EXHAUST HIS CLAIMS FIRST IN STATE COURT. MOREOVER,
 23 EVEN IF A PETITIONER HAD GOOD CAUSE FOR THAT FAILURE, THE DISTRICT COURT WOULD
 24 ABUSE ITS DISCRETION IF IT WERE TO GRANT HIM A STAY WHEN HIS UNEXHAUSTED
 25 CLAIMS ARE PLAINLY MERITLESS. Cf. 28 U.S.C. § 2254(b)(2) (“AN APPLICATION FOR
 26 A WRIT OF HABEAS CORPUS MAY BE DENIED ON THE MERITS, NOTWITHSTANDING THE
 27 FAILURE OF THE APPLICANT TO EXHAUST THE REMEDIES AVAILABLE IN THE COURTS OF
 28 THE STATE”).

29 *Rhines*, 544 U.S. at 277.

If Williams wishes to ask for a stay, he must file a motion for stay and abeyance in which he demonstrates good cause for his failure to exhaust his unexhausted claims in state court and presents argument regarding the question of whether his unexhausted claims are plainly meritless. Respondents would then be granted an opportunity to respond, and Williams to reply. Or Williams may file a declaration voluntarily abandoning his unexhausted claims, as described above.

Williams' failure to choose any of the three options listed above, or seek other appropriate relief from this Court, will result in his federal habeas petition being dismissed. Williams is advised to familiarize himself with the limitations periods for filing federal habeas petitions contained in 28 U.S.C. § 2244(d), as those limitations periods may have a direct and substantial effect on whatever choice he makes regarding his petition.

VI. Conclusion

It is therefore ordered that Respondents' motion to dismiss (ECF No. 21) is granted as follows: Grounds 4, 5 and 7 are unexhausted.

It is further ordered that Williams has 30 days to either: (1) inform this Court in a sworn declaration that he wishes to formally and forever abandon the unexhausted grounds for relief in his federal habeas petition and proceed on the exhausted grounds; or (2) inform this Court in a sworn declaration that he wishes to dismiss this petition without prejudice in order to return to state court to exhaust his unexhausted claims; or (3) file a motion for a stay and abeyance, asking this Court to hold his exhausted claims in abeyance while he returns to state court to exhaust his unexhausted claims. If petitioner chooses to file a motion for a stay and abeyance, or seek other appropriate relief, Respondents may respond to such motion as provided in Local Rule 7-2.

It is further ordered that if Williams fails to respond to this Order within the time permitted, this case may be dismissed.

It is further ordered that if Williams elects to abandon his unexhausted grounds, Respondents have 30 days from the date Williams serves his declaration of abandonment

1 in which to file an answer to Williams' remaining grounds for relief. The answer should
2 contain all substantive and procedural arguments as to all surviving grounds of the
3 petition and comply with Rule 5 of the Rules Governing Proceedings in the United States
4 District Courts under 28 U.S.C. §2254.

5 It is further ordered that Williams will have 30 days following service of
6 Respondents' answer in which to file a reply.

7 It is further ordered that Williams' motion for appointment of counsel (ECF No. 28)
8 is denied.

9 It is further ordered that Williams' motion for extension of time to file an opposition
10 to the motion to dismiss (ECF No. 27) is granted nunc pro tunc.

11 It is further ordered that Respondents' motion to strike (ECF No. 31) is denied as
12 moot.

13 DATED THIS 15th Day of April 2021.

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16 MIRANDA DU, CHIEF JUDGE
17 UNITED STATES DISTRICT COURT
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